

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN -7 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0248-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DUANE WALTON EDWARDS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074171

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts

Tucson
Attorneys for Petitioner

B R A M M E R, Presiding Judge.

¶1 Petitioner Duane Edwards challenges the trial court's summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, and, for the following reasons, deny relief.

¶2 Pursuant to a plea agreement that resolved charges in two separate cause numbers, Edwards was convicted of one count of theft, committed in August 2007, and one count of trafficking in stolen property, committed in November 2007.¹ The trial court sentenced him to consecutive, presumptive, 3.5-year prison terms.

¶3 In an of-right petition for post-conviction relief, Edwards alleged his counsel had rendered ineffective assistance at sentencing by failing to present, as mitigating circumstances, evidence that Edwards suffered from Marfan Syndrome² and a learning disorder. He also maintained counsel was ineffective because he had failed to accompany Edwards to his presentence investigation interview with a Pima County Adult Probation Officer.

¶4 The trial court summarily dismissed Edwards's petition after finding he had failed to state a colorable claim for relief. With respect to Edwards's claim that counsel had failed to offer evidence of his medical condition and learning disability at sentencing, the court stated that, accepting these circumstances as true, "[n]either factor would have changed [its] sentencing decision." Thus, the court implicitly found Edwards had failed to state a colorable claim of the prejudice required to prevail on a claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)

¹Pima County Cause Nos. CR20074171 and CR20074413 were thus consolidated for sentencing. Although Edwards has filed his petition for review under Cause No. CR20074171 alone, he appears to challenge the sentences imposed in each case, as reflected in his petition for post-conviction relief.

²According to information filed with Edwards's petition for post-conviction relief, Marfan Syndrome is a connective-tissue disorder that may compromise cardiac functioning.

(defendant must establish both deficient performance and resulting prejudice to prevail on ineffective assistance claim; prejudice requires showing of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”). The court further concluded that counsel’s failure to attend Edwards’s presentence investigation interview did not give rise to a claim of ineffective assistance of counsel, reasoning that Edwards had no Sixth Amendment right to counsel at the interview because it was not a “critical stage” of the adversary proceedings. This petition for review followed.

¶5 On review, Edwards does not challenge the trial court’s findings or conclusions, but argues his counsel was ineffective because he was unprepared for the sentencing hearing and failed to “address[] the factors contained in the presentence report relating to [Edwards’s] lack of remorse and the appropriateness of probation.” According to Edwards, had counsel explained that Edwards was remorseful, but that his remorse was “restricted to that for which he was responsible,” his sentences “would likely have been different.”

¶6 But counsel’s alleged failure to present sufficient argument on the issue of remorse was not a basis for Edwards’s claim of ineffective assistance of counsel in his petition for post-conviction relief. This court will not consider for the first time on review issues neither presented to nor ruled on by the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court . . . which the defendant wishes to present” for review). Moreover, Edwards

has not shown—or even argued—that the court abused its discretion in dismissing the claims he did raise in his petition below. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006) (trial court’s summary denial of post-conviction relief reviewed for abuse of discretion).

¶7 Accordingly, although we grant review, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge